

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FILED

SEP 11 2018

Clerk, U.S. Courts
District Of Montana
Missoula Division

TOBY KITTRELL,

Petitioner,

vs.

MARC JOHNSON, HEATHER
SMITH, ATTORNEY GENERAL OF
THE STATE OF MONTANA,

Respondents.

CV 18-86-M-DLC-JCL

ORDER

United States Magistrate Judge Jeremiah C. Lynch entered his Order and Findings and Recommendations (Doc. 5) in this case on May 21, 2018, recommending that Petitioner Toby Kittrell's ("Kittrell") habeas petition be dismissed without prejudice as unexhausted. Because Kittrell did not object to the Findings and Recommendations, he has waived his right to de novo review thereof. 28 U.S.C. § 636(b)(1)(C). This Court reviews for clear error findings and recommendations to which no party objects. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists when the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

Having reviewed the Findings and Recommendations, the Court finds no clear error in Judge Lynch's conclusion that Kittrell's habeas petition should be dismissed without prejudice for failure to meet the exhaustion requirements under 28 U.S.C. § 2254(b)(1)(A). As Judge Lynch indicates, this Court cannot review Kittrell's claims because he has failed to exhaust his available state court remedies. Additionally, this Court finds no clear error in Judge Lynch's conclusion that a certificate of appealability should be denied.

Accordingly, IT IS ORDERED that Judge Lynch's Findings and Recommendations (Doc. 5) are ADOPTED IN FULL. This matter is DISMISSED WITHOUT PREJUDICE as unexhausted.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter judgment of dismissal.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

DATED this 11th day of September, 2018.



Dana L. Christensen, Chief Judge
United States District Court